Docket Call

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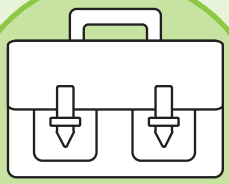
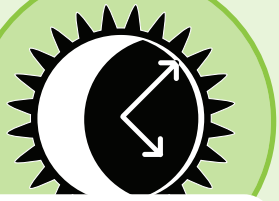
Joanna L. Faust, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue





What Women Really Want

Macel Janoschka and Lindsey Waters Coley

It is no secret that mid- to large-sized law firms have historically struggled with the retention of women. Women graduate from law schools and start out as first year associates at nearly the same rate as men. Yet, the most recent study conducted by the National Association of Women Lawyers (NAWL) reports startling statistics regarding the fall-off of women throughout their legal careers: women lawyers account for fewer than 16% of equity partners; only about 6% of law firms have women managing partners; women continue to earn less than their male counterparts; and women equity partners earn typically about $66,000 less than their male counterparts. Young female associates spend a lot of time trying to understand the reasons behind these statistics and learning how to overcome perceived obstacles in order to achieve success at the same rate as their male counterparts.

Most law firms today recognize the importance of successfully recruiting and retaining women attorneys. However, the more important question is whether these law firms understand the unique challenges of women attorneys so that they are able to brainstorm and implement effective plans to address these critical issues. Recently, a few law firms that have developed and implemented "women's initiatives" have discovered that such initiatives aid in their progress towards improving female retention, advancement, and work-life balance.

For instance, McGuireWoods, a national law firm with four offices in Virginia, has committed to taking measures to create a working environment that is mindful of non-work-related responsibilities. Although its women's initiative began over 20 years ago, it has recently been spearheaded by a female partner, Kim Cacheris, who has primarily focused on ensuring that policies are not only supported by the firm, but that the lawyers are knowledgeable of and understand the terms of these policies and their importance to the firm's long-term success. In addition to McGuireWoods's benefits and policies described below, Ms. Cacheris has made it a personal priority to improve the retention of senior female associates and the promotion of women to partner level within the firm.

For example, associates at McGuireWoods are permitted to work part-time or flex-time schedules and remain on the partnership track. Additionally, the firm provides all attorneys and staff with eighty hours of back-up care with a nationally recognized day care at a minimal cost. It also creates a support system by offering primary caregivers eighteen weeks paid maternity/paternity leave, after which time the caregiver can opt to take a one year unpaid leave of absence with no change in his/her status or position. Upon return from leave, new moms and dads have a six month "ramp-up period" during which they are allowed a 20% reduction in billable hours with no reduction in pay. Finally, the firm pairs a mother on maternity leave with a "maternity leave liaison" who helps the mother with the transition to maternity leave, keeps the mother in the loop while she is out, and provides emotional and professional support following the return to work.

Ms. Cacheris notes that in exit interviews, female attorneys now rarely state that they are leaving because of trouble with work/life balance. In addition, turnover among female associates at McGuireWoods is down and the number of female equity partners has

continued on page 6

see you in court

Robert E. Byrne, Jr.

Pitfalls Regarding Parties

The Supreme Court of Virginia's recent decision in *Idoux v. Helou*, 2010 Va. LEXIS 56 (Apr. 15, 2010) illustrated a pitfall that has bedeviled many litigators across the Commonwealth — failing to name the proper party in litigation. In *Idoux*, the plaintiff sued an estate, then, after the statute of limitations expired, served the estate's personal representative with the suit. The defendant filed a plea in bar contending the suit against the estate was a nullity and that because the statute of limitations had expired, the suit could not be amended to name the personal representative as a party. The trial court agreed and sustained the plea in bar.

On appeal before the Supreme Court of Virginia, the plaintiff claimed Va. Code § 8.01-6.2(B) tolled the applicable statute of limitation, thereby entitling him to amend his suit to substitute the proper party — the estate's personal representative — for the improper party — the estate. The Supreme Court disagreed. The Supreme Court reasoned that the statute of limitations is tolled only when suit is brought against a proper party but a "[complaint] against an 'estate' is a nullity and cannot toll the statute of limitations." Further, the Court explained that § 8.01-6.2(B) tolls the applicable statute when the estate's personal representative is unable to legally receive service of process. This was a far cry from the *Idoux* case, where the personal representative was available but the plaintiff failed to name that representative as a party. The Court therefore dismissed plaintiff's suit.

As disastrous as the *Idoux* opinion was for the plaintiff, it was hardly unique in litigation. The Virginia Reports routinely feature cases in which the incorrect parties have been named in litigation, leading to drastic results for plaintiffs and counter-plaintiffs alike. Other memorable examples of this type of pitfall include:

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Not naming the representative

Idoux provides fair warning to litigators to name the personal representative in cases involving estates. The same warning also applies to cases involving trusts, in which the trustee must be named as the party. *See Grenco Real Estate Inv. Trust v. Brooker*, 215 Va. 413, 414 (1975) ("[A]t common law a trust could not ordinarily sue in its own name but only by its trustees...").

Suits involving minors

Pursuant to Va. Code § 8.01-8, a minor may bring a lawsuit only "by his next friend." This requires that the suit be brought in the name of the minor "by" the next friend of the child, not in the name of the next friend of the child. This seemingly insignificant distinction has significant consequences if done incorrectly, as it will result in dismissal of the case. *See Herndon v. St. Mary's Hospital, Inc.*, 266 Va. 272 (2003).

Naming the incorrect party

Virginia Code § 8.01-6 grants parties substantial leeway to amend a party misnomer "by inserting the right name," and, when authorized, such an amendment relates back to the original pleading. Taking advantage of this provision, however, requires that the correct party was named incorrectly in the original pleading, not that an incorrect party was named in the original pleading. *See Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 172 (1996) ("A misnomer 'arises when the right person is incorrectly named, not where the wrong [person] is named.'").

Procedural pitfalls abound in litigation. Such hazards involving parties can be avoided, however, by thoroughly investigating the facts and law at the outset of each case. With your mind wrapped firmly around the theme and theory of your case, take the time to identify the parties to your litigation, ascertain their proper legal names, determine whether they are parties in their individual or representative capacity, and learn why those parties are necessary for your case. When your case heats up and the statute of limitations for a claim or counterclaim has expired, you'll sleep soundly at night knowing you have properly named all parties.

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message from the president

Lesley Pate Marlin

Headed to the Beach!

With summer just around the corner, it's time to plan a trip to the beach. How about heading to Virginia Beach on June 17, 2010? That's when the Virginia State Bar Annual Meeting kicks off. The Annual Meeting offers young lawyers the opportunity to earn up to 5.0 CLE credits (including 3.0 ethics credits), network with judges and other lawyers, socialize with other young lawyers, compete in athletic events, and, of course, enjoy the beach.

For those of you who can make it to Virginia Beach by 6:30 p.m. on Thursday, June 17, please join me at the Reception on the Hill in the Original Cavalier Hotel. I look forward to welcoming all young lawyers to the Annual Meeting at the Reception.

Bright and early on Friday morning, June 18, the YLC will co-sponsor the 29th Annual Run in the Sun with Virginia Lawyers Media. The 5K race starts at 8:00 a.m. at the beginning of the Boardwalk, at 38th Street and Atlantic Avenue.

Right around the time the race ends, the Showcase CLE program begins. Offering 2.0 CLE credits, the program entitled "Chasing the Internet — Is the Law Keeping Up?" promises to be a lively panel discussion of the real life problems posed by the use and abuse of the internet.

Immediately following the Showcase CLE, the YLC will sponsor a CLE entitled "Diagnosing The Top Legal Issues Facing Clients with Cancer." The program begins at 11 a.m. and will offer 1.5 CLE credits (including 0.5 ethics credits). It will be an overview of the legal issues facing cancer survivors, including creditor issues, medical directives, and ethics issues.

After the CLE hosted by the YLC, all of the young lawyers will gather at 12:30 pm for the YLC's annual membership meeting. Over lunch and cocktails, the YLC will present Outstanding Service Awards to deserving young lawyers, bestow its R. Edwin Burnette Jr. Young Lawyer of the Year Award, recognize its departing Board members, and elect its leadership for the 2010-2011 bar year. In our final order of business, I will pass the gavel to the incoming YLC President, Carson Sullivan of Arlington.

The YLC will gather again at 5:30 p.m. for a pool-side reception. Each young lawyer will receive two free drink tickets for the pool-side reception. When the YLC reception winds down, we will head over to the President's Reception and the Banquet. The YLC usually has several tables (if not more) at the Banquet, so be sure to purchase your banquet tickets and join us.

VIRGINIA STATE BAR

72nd Annual Meeting

VIRGINIA BEACH

June 17-20, 2010

The Annual Meeting winds down on Saturday at 1:00 p.m. with the 26th Annual David T. Stitt Memorial Volleyball Tournament, which is sponsored by the YLC, Chicago Title Insurance Company, and the Maddox Law Firm, PC. Other activities that you may not want to miss are Family Bingo from 3 p.m. to 4 p.m. on Friday, the Special Program entitled "Law and (dis)Order! Help for the Organizationally Challenged" from 9:45 a.m. to 11 a.m. on Saturday, and the Boardwalk Art Show, occurring all weekend.

Casual attire is encouraged for the Annual Meeting, but dressy casual attire is appropriate for the Banquet. For more information or to register for the 2010 Annual Meeting, please visit http://www.vsb.org/special-events/annual-meeting/index.php/. The registration fee for anyone who is attending the Annual Meeting for the first time is only $130.00. For all others, the registration fee is $180.

So what are you waiting for? Don't delay, register today. See you at the beach!

Lesley Pate Marlin practices labor and employment law at Venable LLP, in Washington, D.C. She can be reached at lpmarlin@venable.com.

David Connerley Nahm

The Standing of Shareholders in the Age of the Corporate Person

A shareholder of a corporation has limited standing when bringing a suit for the mishandling of a corporation. Generally, there are two ways in which a shareholder of a corporation can have standing to sue the board of directors of the corporation.

The first is when the corporation's management damages the corporation in some way. The corporation itself then has standing to sue. However, if the corporation does not do so, the shareholders then have a right to bring a derivative action against the board of directors or management on behalf of the corporation. In a shareholder's derivative suit, the claim pressed by the shareholder is not her own but the corporation's, and the plaintiff shareholder is at best a nominal plaintiff.

Secondly, a shareholder in the same situation, who has a direct personal interest in a cause of action may bring the suit. It is this second source of standing that is the basis of a recent case decided by the United States Court of Appeals for the Tenth Circuit, *Bixler v. Foster*, 2010 WL 597477 (10th Cir. Feb. 22, 2010). In *Bixler*, the court held that shareholders of a corporation did not have standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to bring an action against the corporation.

The case involved a transfer of uranium mining claims from New Mexico's Mineral Energy and Technology Corporation ("METCO") to an Australian mining company, Uranium King, Ltd. ("UKL"). The METCO board of directors negotiated the trade of the mining rights in exchange for $6.5 million and UKL stock which was to be distributed pro-rata to the shareholders of METCO. The plaintiff shareholders alleged that once the transfer of interest in the mining claims was made, UKL merged with a third party, Monaro Mining NL ("Monaro") and then repudiated the agreement—neither paying the $6.5 million or giving the shares of UKL stock. However, according to the plaintiffs, the board of directors were "highly compensated" for the transaction.

The plaintiffs filed suit in the United States District Court for the District of New Mexico under RICO, alleging that this conduct defrauded the shareholders of their UKL shares and destroyed the value of their investment in METCO. The defendants filed a motion to dismiss the case claiming that the Plaintiffs did not have standing under RICO for claims of diminution of value of their interest in METCO. The District Court granted the motion and the plaintiffs appealed.

The plaintiffs argued that they had a personal interest in the cause of action that granted them standing because the actions of the board of directors diluted their individual ownership interests in the corporation. The court found, however, that though the majority shareholders received personal compensation for arranging the transfer of mining rights, they were not given additional shares of the corporation, nor were their shares made somehow more valuable. Therefore, the plaintiffs' shares were not devalued and there was no standing to sue derivatively under RICO.

This decision brings the Tenth Circuit in line with the other United States Courts of Appeal. *See Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1024-25 (8th Cir. 2008); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir. 1998); *Frank v. D'Ambrosi*, 4 F.3d 1378, 1385 (6th Cir. 1993); *Whalen v. Carter*, 954 F.2d 1087, 1091-92 (5th Cir. 1992); *In re Sunrise Sec. Lit.*, 916 F.2d 874, 880-81 (3d Cir. 1990); *Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30 (1st Cir. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir. 1986).

The recent decision by the Supreme Court in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) has brought a good deal of attention to the nature of the corporate entity. The relationship between the shareholder and the corporation with regard to standing issues is part of this discussion. While the facts of *Bixler* would certainly indicate that the shareholder plaintiffs were damaged in some way, by interposing between the shareholders and the wrong-doing board a person—the corporation—the plaintiffs are once-removed from that cause of action. Unless a shareholder can satisfy the requirements of bringing a derivative suit on behalf of the corporation, he has no more standing to sue than any individual on behalf of another individual. As the idea of a corporation's personhood grows and expands, it will be interesting how shareholder rights and standing develop and to see whether shareholders find that they have fewer opportunities to address wrongs that they perceive with regard to the operation of a corporation or if the law develops new theories to bring them closer to the creature they helped create.

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Broderick Dunn

A Day in the Life of... a Civil Litigation Associate

They say that the best laid plans of mice and men often go awry. Perhaps young associates should be added to the list. In my three years of practice as a litigation associate, first at Hirschler Fleischer and now at Sands Anderson, I've learned that you have to expect the unexpected.

I end every day by pulling up my Outlook calendar and task list to see what I have on the agenda for the next day. Wednesday night was no different. Most Thursday mornings, I play basketball at 6 a.m. with a group in downtown Richmond that includes many other young attorneys. From about 8:30 a.m. until lunchtime, I planned to work on propounding some discovery requests to the plaintiff in a judicial dissolution case in which we represented the corporation. From noon until 1 p.m., I was going to grab lunch with one of my law school classmates at my favorite Richmond restaurant, Lulu's. I was going to spend the rest of the afternoon conducting research under the Fair Labor Standards Act to determine if a client's employee was entitled to overtime pay. Lastly, I was supposed to have drinks with one of my high school classmates to discuss our alumni group's scholarship essay contest.

Aside from having to wake up at 5:30 a.m. and missing a lot of shots, basketball went off without a hitch. Most of the discovery requests were pretty formulaic and I even found a go-by (a lifesaver for any associate) on the system. I eagerly looked ahead to finishing my Fair Labor Standards Act research early and plowing ahead to drafting a complaint that I told the supervising attorney I would have done by Tuesday of the following week. All of this changed when a partner from another section knocked on my open door with a harried look on his face.

Apparently, one of the partner's out-of-state clients ("Client A") had been served with a complaint from a local jurisdiction. Service of a complaint on a party is usually fairly unremarkable. In a perfect world, a defendant in a civil suit is served, personally, and notifies counsel well before the 21-day period during which the party must respond is up. In this case, Client A was served through the Secretary of the Commonwealth. Accordingly, service was deemed complete when the clerk of the trial court received the certificate of mailing from the Secretary of the Commonwealth, whether or not Client A ever received the process. The trial court received the certificate of mailing 17 days ago, making our answer due by Monday.

Normally, four days is plenty of time to meet with your client and draft an answer. However, there were a number of factors working against us. First, the partner had to be out of town that afternoon and through the upcoming weekend on other matters. Secondly, opposing counsel couldn't be reached so an extension was out of the question. Lastly, the complaint was voluminous and had over 25 exhibits which I had to review and discuss with our client. Needless to say, my lunch plans and quiet afternoon research were supplanted by conference calls with our client and drafting a preliminary answer.

The rest of my scheduled day wasn't totally disrupted. Sands Anderson prides itself in its attorneys being "citizen lawyers." One of my colleagues is president of the board at Big Brothers and Big Sisters of Central Virginia. Another is an auxiliary police officer with Chesterfield County. Still others are actively involved with their synagogues and churches. Despite my hectic and unpredictable day, I was still able to meet with my classmate to review essays submitted by children from the Boys and Girls Club, Peter Paul Development Center and other local organizations for the Woodberry Forest Association of Richmond's summer camp scholarship program. Reading the children's essays that were ostensibly about their favorite athletes, but were really windows into the children's own lives and struggles, helped to put my hectic day into perspective.

As young associates whose time is at a premium, it's often helpful to step back and look at the big picture. We can bill hours and still do things outside of work that we find enjoyable and fulfilling. With a little luck and lots of flexibility, most of our best laid plans are still doable.

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A Day in the Life of... SUBMISSIONS

In this issue, ***Docket Call*** unveiled its newest feature "A Day In The Life Of..." to spotlight the various roles and diverse practice areas of young lawyers around the Commonwealth.

If you would like "Your Day" to be featured in an upcoming issue, contact:

Joanna Faust at joanna.faust@leclairryan.com to find out more.

What Women Really Want, continued from front cover

increased in the last three years, both of which demonstrate a direct correlation between women's initiatives programs and female retention and advancement. McGuireWoods was the only Virginia law firm to receive national recognition in 2009 as a result of its women's initiative program when named as one of the fifty best law firms for women by Working Mother magazine and Flex-Time Lawyers.

Many other law firms in Virginia are embracing similar ideas and implementing women's initiatives. Gentry Locke Rakes & Moore, a mid-sized firm in Roanoke, has developed a women's initiative program aimed at encouraging professional development among its female attorneys. Gentry Locke recognizes that marketing and leadership styles for women differ from those of their male counterparts. The women's initiative embraces these differences by encouraging female attorneys to identify what works best for them and implement it.

The female attorneys at Gentry Locke recently attended a luncheon where Justice Sandra Day O'Connor was an inspirational keynote speaker. She discussed leadership qualities, the status of women, and the ongoing process of achieving gender equality in the legal profession. A few times each year, the firm's women lawyers also get together outside of the office to connect and socialize. The firm annually sponsors one female attorney's enrollment at a leadership institute at a local university, and several attorneys are offered an opportunity to work with a professional development coach. Additionally, Gentry Locke has created a Women's Executive Forum that facilitates networking opportunities for its female attorneys. The Forum not only encourages Gentry Locke attorneys to interact with other female professionals throughout the community, but also provides them with rainmaking opportunities.

There is no "one size fits all" approach when it comes to tackling the female attorney retention and advancement issue that has plagued the legal profession. As clients are continuing to demand diverse legal representation, law firms are being forced to think outside of the box and implement creative opportunities to retain women. The first step is for law firms to demonstrate a commitment to improving the retention and advancement of women in the legal profession-both on paper and in practice. One step to achieving this goal is for law firms to be proactive in recognizing and understanding the unique challenges faced by women, offer leadership opportunities for women, foster support systems for women, and embrace the concept of non-traditional or flex-time schedules.

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Upcoming Events

6/18 | YLC Annual Meeting

6/18 | Annual Meeting CLE: Diagnosing the Top Legal Issues Facing Clients with Cancer

6/18 | YLC Annual Meeting Pool-side Reception

7/18-7/23 | Oliver Hill Samuel Tucker Law Institute

7/30 | YLC Board of Governors Dinner

7/31 | YLC Board of Governors Planning Retreat

8/05-8/10 | ABA Young Lawyers Division Annual Meeting & Assembly

For a complete, up-to-date list of events, please visit:
http://www.vsb.org/site/events/

Have you undertaken a successful YLC program in your jurisdiction or circuit?

If so, please submit a brief program report and photos to YLC secretary Christy Kiely at ckiely@hunton.com for consideration for ABA and Virginia State Bar programming and service awards.

legal ethics corner

Jeffrey H. Geiger

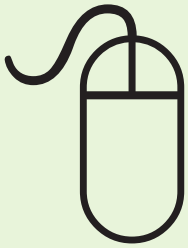
You Make the Call

Q During a very interesting deposition of Yota Spice, a witness in an upcoming trial, I learned that she was a little favorable to the other side. Yet, my gut tells me she was shading the truth concerning a number of subjects. My ears perked up, however, when she revealed that she is on both Facebook and MySpace and has "a billion friends because I am, like, so likable and everyone wants to be my friend." Apparently, I cannot access her Facebook or MySpace accounts unless she accepts me as a friend. Because she may remember my name from the deposition, I was thinking that I would have a paralegal—using her real name and providing only truthful information—see if she could gain access to her social network profiles. Still, something feels weird.

A Weird, you say, right you may be. While Virginia has not formally weighed in on the issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 concluded that the proposed investigation constituted unethical pre-texting. Specifically, a paralegal seeking access to a witness's social media pages would be doing so under false pretenses, i.e., to find out information about the witness without revealing the true nature of the inquiry. To do so would be in violation of ABA Model Rule of Professional Conduct 4.1 (making a false statement of fact to a third-person), Rule 8.4 (misconduct to engage in conduct involving dishonesty), and Rule 5.3 (responsibility for non-lawyer assistants).

The Committee's conclusion is not without detractors. Think of the private investigator sitting in the proverbial tinted van videotaping a person claiming a disability who is engaged in normal activities—clearly that is acceptable. The Committee rejected the videotaping analogy, noting that: "The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker." Yet, the reference to privacy holds less credence in my mind given the very nature of the social network at issue. Clearly, it would not be deceitful if the lawyer found an existing friend of Spice to allow him to view her page. Still, at the end of the day, the lawyer could avoid all of the ethical issues and take the sure fire approach of issuing a subpoena for the records or access to the records (understanding that such action will likely chill any further germane online posts). I cannot say that I have reached a definitive conclusion on the issue and would welcome your comments.

Jeff Geiger serves as Firm Counsel and Chair of the Business and Professional Liability Litigation Group with Sands Anderson Marks & Miller, P.C. He can be reached at jgeiger@sandsanderson.com.



Coming Up!

Stay tuned for the Summer 2010 Docket Call, which will feature an overview of the Annual Meeting and our two new columns, "Bankruptcy Bites" and "Family Law Corner."

As always, check our website for the most up-to-date news and event listings, as well as archived issues of Docket Call!

http://www.vayounglawyers.com/

Docket Call

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